IP 97-2038-C T/G Willis v Anderson Comm. School [2]
Judge John D. Tinder Signed on 01/28/98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES RANDALL WILLIS II, by his next friend and father, JAMES RANDALL WILLIS, Plaintiff, vs. ANDERSON COMMUNITY SCHOOL CORPORATION, Defendant.	)	IP 97-2038-C-T/G

ENTRY DENYING VERIFIED MOTION FOR PRELIMINARY INJUNCTION

On December 29, 1997, Plaintiff James Randall Willis II, by his next friend and father, James Randall Willis, commenced this action by filing his Verified Complaint for Declaratory and Injunctive Relief, challenging Defendant Anderson Community School Corporation's ("School Corporation") drug testing policy. Plaintiff also filed his Verified Motion for Temporary Restraining Order or Preliminary Injunction ("Verified Motion"), and a supporting memorandum of law.

On January 2, 1998, the court held a hearing on Plaintiff's Verified Motion. At the hearing, the parties agreed that the motion and hearing would be limited to the request for a temporary restraining order. The request for a temporary restraining order was denied by the court.

This cause now comes before the court on Plaintiff's Verified Motion for Preliminary Injunction. Having considered the motion, the parties' briefs, affidavits and other submissions, the court finds that the motion should be **DENIED**.

I. Background

In 1996, Kathy Fox, Dean of Students at Highland High School in Anderson, Indiana, discussed her perception of an increasing drug and alcohol abuse problem among high school students in Anderson, Indiana, with Dean Neal Rectar, Dean of Highland High School, as well as with school officials at Anderson High School, who expressed concerns about the increase in disciplinary problems and suspected drug and alcohol abuse. (Fox Aff. ¶¶ 2, 3.) A committee of Anderson community school administrators, deans, parents, community leaders, and central office personnel ("the Committee") was formed and reviewed other schools' drug and alcohol testing policies, surveys, texts and data showing a causal nexus between drug and alcohol abuse and disciplinary problems, and the actual test results from the drug/alcohol testing of the Carmel Clay Schools. (*Id.* ¶ 5.) One such text reviewed explains:

> A great amount of research has been generated on the topic of adolescent substance abuse. Within the body of this research, there is a general consensus that *there are certain behaviors which can help identify those adolescents who are using alcohol or other drugs on a regular basis.* Those behaviors include . . . truancy and tardiness, *verbal and physical abuse towards staff and classmates*, vandalism, absenteeism, and a sudden drop in grades. These behaviors are not conclusive on their own that a student is using drugs, but they are indicators that point to that possibility.

(Stipluation A to Exs. Introduced at Deps., Ex. 2 at 2 (*Drug Testing Policy Rationale*) (emphasis added); *see also id.* at 3 (Robert Bowman, *Statistics on Violence*) (noting that drug users are more than twice as likely to get into physical fights than nonusers); *id.* at 7 (Gary and Ann Lawson, *Adolescent Substance Abuse: Etiology, Treatment, and Prevention*) (acknowledging that "[a]lthough many of the following behaviors are to some extent normal in many adolescents at certain times, frequency of occurrence and clustering of . . . behaviors [such as "developing a short temper" and "exhibiting abusive behavior"] are indicative of possible substance abuse and should be investigated . . . ."); (Tegarden[1] Aff., Ex. 2 (*Statistics on Violence*) ("Destructive school behaviors such as . . . violence . . . correlated with student use of alcohol and other drug use. Users are . . . more than twice as likely to get into physical fights . . . .") The Committee recognized a drug/alcohol abuse problem in their schools on the basis of the number of disciplinary referrals and the types of disciplinary problems, including disruptive behavior in the classrooms such as fighting. (Fox Aff. ¶ 6.)

On or about August 5, 1997, the Anderson high schools adopted a drug and alcohol testing policy. (*Id.* ¶ 8.) The policy's stated purpose is "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately." (Students Secondary Drug Testing (hereinafter ("Policy") (attached to Pl.'s Compl.) at 3.) The policy expressly states that: "[t]he results of the test are for parental use only and will not result in any additional punishment by school

[1] R. Stephen Tegarden is the Superintendent of Carmel Clay High Schools (Tegarden Aff. ¶ 20.)

officials." (*Id.* at 3.) Upon a positive test result, a student is required to participate in a drug education program. A refusal to submit to the drug test is considered an admission of being under the influence of alcohol or other drugs, which is a violation of school rules and will be dealt with according to the student discipline policy. (*Id.* at 5.)

The policy provides, *inter alia*, that if a student is suspended from school for more than three days for fighting, the student must submit to a drug test administered under school supervision.[2] The policy is enforced as against all students who are suspended for three days or more, without exception. (Nikirk Dep. at 4.) The test results from the first semester of the 1997-1998 academic year have reflected a correlation between disciplinary problems and drug and alcohol use. (*Id.*) In fact, forty-six percent of all Highland High School students tested under the policy tested positive for an illegal substance, (Stipulation A to Exs. Introduced in Deps., Ex. 2 at 25), and thirty percent of all expulsions from Highland High were drug-related.[3] (*Id.* at 26.) During the fall semester of the 1997-1998 academic year at Anderson High School, twenty-five percent of all students who were tested, tested positive for illegal substances. (*Id.*, Ex. 4.) More specifically, forty percent of Highland High School students who were tested under the policy because of fighting tested positive for an illegal substance, (Stipulation

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[2] The drug testing policy provides in pertinent part: "When students commit a disciplinary infraction which results in suspension from school for three (3) days or more, they will be required to submit to a drug test." (Students Secondary Drug Testing (hereinafter (Policy") at 4 (attached to Pl.'s Compl.)

[3] Forty-one percent of all suspensions from Highland High during the 1996-1997 academic year were drug-related. (*Id.* at 31.)

A to Exs. Introduced in Deps., Ex. 2 at 25 ("Significant Statistics from H.H.S.")); for Anderson High School students, the percentage was eighteen. (*Id.*, Exs. 4, 5.)

Plaintiff, James Randall Willis, II, is a freshman at Anderson High School and is fifteen years old. In early December 1997, Mr. Willis was in a fight with another student. Following the fight, Mr. Willis and the other student were taken to the office of the Dean of Freshman Students at Anderson High School, Philip W. Nikirk. Dean Nikirk observed Mr. Willis and did not observe anything to suggest that he was impaired or under the influence of drugs or alcohol. (Nikirk Dep. at 16.) Mr. Willis was suspended from school for five days because of his fighting. Specifically, he was suspended because he had verbally abused another student, thrown an object at that student, and punched that same student four to five times. (Nikirk Aff. ¶ 4, Ex. 1.) The student involved in the fight with Mr. Willis was also suspended from school for fighting.

When Mr. Willis returned to school following his five-day suspension, he was requested to submit to a drug test because he had been suspended for fighting. (Nikirk Dep. at 16.) He was told that he would be tested on December 19, 1997, the next day that the drug testing was to be conducted at the school. Mr. Willis refused to submit to the drug test because he believes that the testing violates his constitutional rights. As a consequence of his refusal, Mr. Willis was suspended for one week commencing the next day of school, which, due to the holiday vacation, was January 5, 1998. He was also advised that if he refused to take the drug test after this one week suspension, he would be suspended again pending expulsion proceedings because his refusal would be deemed an admission of unlawful drug use.

Mr. Willis claims that the School Corporation's drug testing policy, which prohibits him from attending school following his five-day suspension unless and until he submits to a drug test, is an unreasonable search and seizure and an invasion of his privacy, and, therefore, violates his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He also alleges that the policy is an unreasonable search and seizure in violation of the Indiana Constitution, Article 1, Section 11 and that the policy violates Indiana law, Indiana Code § 20-8.1-5.1-8.

II. Discussion

The Seventh Circuit recently set forth the applicable legal standard for issuance of a preliminary injunction:

> When considering a motion for a preliminary injunction, a district court must first determine whether the movant has demonstrated: 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied, and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties.

TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997) (citing *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1291 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997)). In opposing Mr. Willis's motion for preliminary injunction, the School Corporation argues only that Mr. Willis cannot demonstrate some likelihood of prevailing on the merits.

A few propositions important to resolution of this case cannot be reasonably disputed. First, school students do not surrender their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Second, the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment, protects students against unreasonable searches and seizures conducted by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). Third, the collection and testing of urine by the government constitutes a search subject to the Fourth Amendment. *Chandler v. Miller*, __ U.S. __, __, 117 S. Ct. 1295, 1300 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *see also Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995); *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989). Finally, school students are entitled to a less exacting protection of their constitutional rights, including Fourth Amendment rights, in the school setting. *See T.L.O.*, 469 U.S. at 340-42; *see also Veronia*, 515 U.S. at 656 (stating that "the nature of those [constitutional] rights is what is appropriate for children in school.").

"To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches." *T.L.O.*, 469 U.S. at 337; *see also Skinner*, 489 U.S. at 618-19. This is because "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner*, 489 U.S. at 619. The constitutionality of a search of a student by a school official in the school setting depends on whether the search was reasonable under all of the circumstances. *T.L.O.*, 469 U.S. at 340-41; *see also*

Veronia, 515 U.S. at 652 ("the ultimate measure of the constitutionality of a governmental search is 'reasonableness'"). Reasonableness is determined by balancing the invasion of the individual's privacy interests against the legitimate governmental interests at stake. *Veronia*, 515 U.S. at 652-53; *Skinner*, 489 U.S. at 619; *T.L.O.*, 469 U.S. at 337-41.

A. *T.L.O.* and Reasonable Suspicion[4]

Under *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a search of a student by a school official is constitutional if it is both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 369 U.S. at 341 (quotation omitted); *Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1149 (7th Cir. 1997). In the Seventh Circuit, "justified at its inception" means that a "'search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of the violation.'" *Bridgman*, 128 F.3d at 1149 (quoting *Cornfield by Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993)). Reasonable suspicion does not require absolute certainty: "'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .'" *T.L.O.*, 469 U.S. at 346 (quoting *Hill v. California*, 401 U.S.

[4] The search in *T.L.O.* was conducted on the basis of individualized suspicion. 469 U.S. at 342 n.8; thus, the court understands the *T.L.O.* test to apply where individualized suspicion exists. *See Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1149 (7th Cir. 1997) (applying *T.L.O.* test in case of individualized suspicion).

797, 804 (1971)). The second part of the *T.L.O.* test means that "'the measures adopted [must be] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" *Bridgman*, 128 F.3d at 1149 (quoting *T.L.O.*, 469 U.S. at 342). It appears that Indiana has adopted the "reasonableness under all of the circumstances" test announced in *T.L.O.* for determining whether a search of a school student passes muster under the Indiana Constitution. *See D.I.R. v. State*, 683 N.E.2d 251 (Ind. Ct. App. 1997).

The court determines based on the record before it, that the School Corporation's drug testing policy as applied to Mr. Willis is reasonable under all of the circumstances. The record discloses that the School Corporation formed a committee, including school administrators, parents, and community leaders, charged with the responsibility of reviewing other schools' drug testing policies and data showing a causal nexus between drug and alcohol abuse and certain behaviors, including verbal abuse towards classmates and physical fighting. They reviewed actual test results from the alcohol and drug testing program conducted by the Carmel Clay schools which revealed that forty percent of the high school students who were tested because of fighting, tested positive for illegal substances. The Committee determined that Highland High School and Anderson High School had drug and alcohol abuse problems in their schools. On this basis, the School Corporation adopted its drug testing policy.

The School Corporation's own test results from the fall semester of the 1997-1998 academic year support the Committee's determination of the existence of a drug

and alcohol use problem in their schools. Forty-six percent of the Highland High students who were tested gave positive results for an illegal substance, and at Anderson High twenty-five percent of the tests results were positive. Indeed, thirty percent of all expulsions at Highland High were drug-related. In the cases of students tested because of fighting, forty percent of such students at Highland High tested positive and eighteen percent of such students at Anderson High tested positive.

The court finds evidence in the record establishing that certain disruptive behaviors, such as verbal abuse of another student and fighting are indicative of possible drug or alcohol abuse. Mr. Willis acknowledges that students who use drugs may evidence inappropriate behaviors, (Pl.'s Suppl. Reply Br. In Supp. of Mot. For Prelim. Inj. at 4), but contends that his one incident of such behavior which led to a suspension for more than three days does not establish reasonable suspicion that he was using drugs. (*Id.* at 4-5.) He argues that one fight does not create reasonable suspicion to search for drugs. (*Id.* at 5.)

Mr. Willis relies on the Seventh Circuit's decision in *Cornfield by Lewis v. School District No. 230*, 991 F.2d 1316 (7th Cir. 1993), in support of this argument. In that case, the plaintiff was a high school student who was in a behavioral disorder program. A teacher's aide observed him and suspected that he was "too well-endowed." Another aide and a teacher also observed an "unusual bulge" in the plaintiff's crotch area. The next day, the student was confronted by the teacher and aide with their suspicions that he was "crotching" drugs, and he became agitated and yelled obscenities. Although the student's mother refused consent, a strip search of the student was conducted. No

drugs or other contraband was found. The student sued, alleging violations of his Fourth, Fifth, and Fourteenth Amendment rights. *Cornfield*, 991 F.2d at 1319. The Seventh Circuit determined that the student's enrollment in the behavioral disorder program was insufficient to support a reasonable suspicion that he was a drug user. *Cornfield*, 991 F.2d at 1322 (stating "[t]he fact that students in such a program exhibit inconsistent behavior and that drug users behave erratically does not lead inevitably to a conclusion that a student in a behavioral disorder program is a drug user"). In holding that the strip search was based on reasonable suspicion, the court relied on other factors, including reports that the student had drugs and the student's claims that he dealt drugs and would test positive for marijuana. *Id.*

Cornfield is distinguishable. It is not argued that reasonable suspicion arises from Mr. Willis's enrollment in any type of behavioral disorder program as in *Cornfield*. Nor is reasonable suspicion premised upon inconsistent or erratic behavior. Rather, the reasonable suspicion is supported by the nexus between the disciplinary behaviors in which Mr. Willis engaged, specifically verbal abuse and physical fighting, and possible drug or alcohol abuse. Further, there is no indication in *Cornfield* of any texts or data reflecting a causal nexus between behavioral disorders, inconsistent behavior, or erratic behavior and possible drug or alcohol abuse. In this case, there is. In the instant case, texts and data, including tests results from the Carmel Clay schools reflects a

correlation between certain disruptive behaviors and drug and alcohol abuse. Indeed, even the test results from Highland High and Anderson High show such a correlation.[5]

Although this is a close call, the court finds that there is a sufficient correlation between Mr. Willis's one instance of fighting and drug or alcohol abuse so as to permit the proposed search. The court recognizes that not all misconduct or bad behavior indicates possible drug and alcohol abuse. Indeed, some of the literature reviewed by the Committee and in the record before the court teaches that such behavior is "to some extent normal," (Tegarden Aff., Ex. 2), and that "frequency of occurrence and clustering of these behaviors are indicative of possible substance abuse and should be investigated." (*Id.*) Admittedly, there is nothing in the record to suggest that Mr. Willis frequently engaged in certain behaviors linked with possible drug and alcohol abuse or that he showed a clustering of such behaviors. Yet, the evidence in the record is sufficient to establish reasonableness under the circumstances.

At first blush, Dean Nikirk's testimony that he had no reason to suspect Mr. Willis of being under the influence of drugs or alcohol following the fight resulting in Mr. Willis's suspension seems somewhat problematic in light of *Bridgman v. New Trier High School District No. 203*, 128 F.3d 1146 (7th Cir. 1997).[6] However, closer consideration

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[5] *Burnham v. West*, 681 F. Supp. 1160 (E.D. Va. 1987), *opinion supplemented by* 681 F. Supp. 1169 (E.D. Va. 1988), and *Cales v. Howell Public Sch.*, 635 F. Supp. 454 (E.D. Mich. 1985), relied on by Mr. Willis, (Pl.'s Suppl. Br. at 5-6), are distinguishable for these reasons as well.

[6] When Dean Nikirk was asked whether he observed anything that would make him think Mr. Willis was under the influence of drugs or alcohol after the fight, Dean

(continued...)

reveals that *Bridgman* presents no barrier to concluding that Mr. Willis's conduct creates a reasonable suspicion for the particular search at issue in this case. In *Bridgman*, Mary Dailey, a school official, observed the plaintiff acting unruly and inappropriately in an after-school smoking cessation program. Ms. Dailey noticed that the student's eyes were bloodshot, his pupils were dilated, and she claimed that some of his answers on a worksheet were "flippant." *Bridgman*, 128 F.3d at 1147.[7] These observations made her suspicious that the student had been using marijuana. She conducted a medical assessment of him, which revealed that his blood pressure and pulse were "considerably higher" than the readings listed on the student's freshman physical examination. A search of the student's outer clothes was then conducted. A drug test taken the next day conclusively indicated that the student had not been using marijuana. *Id.* at 1147-48.

In opposing summary judgment, the student presented expert testimony that the physical symptoms on which Dailey relied and the blood pressure and pulse readings were not reliable indicators of marijuana use. The defendants presented evidence that bloodshot eyes, dilated pupils, and increased blood pressure and pulse indicated marijuana use. *Id.* at 1149. The Court explained:

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[6](...continued)
Nikirk answered, "I had nothing at that time that would give me reasonable suspicion, no." (Nikirk Dep. at 16.)

[7] She also claimed that his handwriting was erratic, but the Court found that this claim was unsupported by any evidence that she had observed his handwriting previously. *Id.* at 1147, 1149.

> the appropriate inquiry is not whether the medical profession uniformly agrees that the symptoms observed and tests conducted indicate marijuana use. Rather, the question is whether Dailey's actions in ordering the medical assessment and then searching Bridgman's outer clothing were reasonable.

Id. The Court determined that "symptoms were sufficient to ground Dailey's suspicion," *id.*, and held that her suspicions were reasonable on the basis of her expertise as a drug addiction counselor, coupled with the publications supporting her interpretation or the student's symptoms and her use of the medical assessment. *Id.* In reaching this conclusion, the Court assumed that the decision to test and search the student was based upon the behavioral and physical symptoms observed. *Id.*

The decision to test Mr. Willis was not based on any behavioral or physical symptoms (such as bloodshot eyes or the odor of alcohol or drugs) observed by Dean Nikirk other than the fight itself; Dean Nikirk testified that the reason Mr. Willis was requested to submit to the drug test was because he had been suspended for fighting. However, as in *Bridgman*, publications support the School Corporation's determination that certain disruptive and bad behaviors indicate possible drug or alcohol abuse. Even the School Corporation's own test results from the Fall Semester of the 1997-98 academic year bear out this correlation. As in *Bridgman*, the decision to test Mr. Willis is, in fact, based on Mr. Willis's own behavior. In adopting its drug testing policy, the School Corporation made the determination that certain disruptive behaviors, including fighting, were indicative of possible drug or alcohol abuse. That Mr. Willis verbally abused, threw an object at, engaged in a physical fight with another student, and was suspended for more than three days as a result, is not disputed. Thus, although Dean

Nikirk did not personally observe any physical symptoms of Mr. Willis which caused him to suspect that he was under the influence of drugs or alcohol, the decision to subject Mr. Willis to the drug test was based upon his disruptive behavior, which has not been disputed.[8] Given the information correlating such disruptive behavior with illegal drug and alcohol abuse, including the test results from both Highland High and Anderson High, Mr. Willis's own disruptive behavior creates a reasonable suspicion that he had been using illegal drugs or alcohol so as to require his submission to the drug test before he may be allowed to return to school. Therefore, the court determines that the search at issue in this case is "justified at its inception."

The court further concludes that the drug test is reasonably related in scope to the objectives of the search and is not excessively intrusive on Mr. Willis privacy rights. First and foremost, the sole stated purpose of the drug testing policy is "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately," (Policy at 3), with the benefits of counseling as a goal. a positive result in the drug test enables the School Corporation to identify a student who uses drugs and involve the parents or guardians in drug education and intervention. Significantly, the scope of the search at issue is limited by the manner in which the School Corporation utilizes the test results. In describing the privacy interests implicated by the drug testing process in *Veronia School District 47J v. Acton*, 515 U.S.

[8] That Mr. Willis's fighting led to suspension for more than three days rather than some lesser disciplinary action suggests the seriousness of Mr. Willis's offense. The court presumes that not all student fights lead to suspension or even suspension for more than three days.

646 (1995) as "negligible," Justice Scalia noted that the test results were not turned over to law enforcement or used for any school disciplinary function and were released to only a few school personnel on a need-to-know basis. *Id.* at 658. The results of tests taken under the policy in this case are neither turned over to law enforcement nor used in any disciplinary action. Further, the test results here are shared only among the parents, the student, and a small number of school administrators. A positive test result cannot be used to refuse readmittance to school or as grounds for further suspension or other such consequence.

The court concludes that the search at issue in the instant case satisfies the two-part test for suspicion-based searches enunciated in *T.L.O.* Accordingly, the court determines that Mr. Willis has not demonstrated a likelihood of prevailing on his claim that the search occasioned by the School Corporation's drug test is unreasonable under the circumstances and, therefore, in violation of his Fourth Amendment rights.[9]

B. Special Needs and Suspicionless Searches

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[9] Given this conclusion and given that Indiana law follows *T.L.O.*, the court does not, and need not, address the claim that the drug testing policy is an unreasonable search and seizure in violation of the Indiana Constitution, Article 1, Section 11. Also, the court does not find that the policy violates an Indiana statute, Indiana Code § 20-8.1-5.1-8, which provides that the grounds for student suspension or expulsion are student misconduct or substantial disobedience occurring: on school grounds during certain times; off school grounds at a school activity, function or event; or while the student is traveling to or from school, a school activity, function, or event. Mr. Willis's refusal to submit to the drug test would constitute substantial disobedience, and, therefore, provides sufficient grounds for his suspension for refusing the test. (Nothing in the record suggests that Mr. Willis has been expelled or even that expulsion proceedings have commenced against him; thus, the court does not decide whether his refusal to submit to the test constitutes sufficient grounds for expulsion.)

Even assuming that the search at issue in this case is not based upon reasonable suspicion, it is nevertheless reasonable given the minimal intrusion on Mr. Willis's privacy interests balanced against the special needs of the School Corporation. Ordinarily, individualized suspicion of wrongdoing is required for a search to be reasonable under the Fourth Amendment. *Chandler v. Miller*, __ U.S. __, __, 117 S. Ct. 1295, 1301 (1997).[10] However, individualized suspicion is not always required. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (upholding suspicionless random drug testing of student athletes); *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) ("neither a warrant nor probable cause, nor, indeed, any measure of reasonable suspicion is an indispensable component of reasonableness in every circumstance"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."); *Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (stating that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion") (citation and footnote omitted); *see also T.L.O.*, 469 U.S. at 342 n.8 ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.").[11] As this court has explained:

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[10] *Chandler* held that the Fourth Amendment proscribed a state statute which conditioned ballot eligibility on the candidate's negative urine test for drugs.

[11] The search in *T.L.O.* was based upon individualized suspicion. *Id.*

> [E]xceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." . . . When such "special needs" -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Todd v. Rush County Schs., No. IP96-1417-C-T/G, 1997 WL 710661, at *5 (S.D. Ind. June 2, 1997) (quoting *Chandler*, 117 S. Ct. at 1301 (citations omitted)), *aff'd*, No. 97-2548, 1998 WL 7352 (7th Cir. Jan. 12, 1998); *see also Von Raab*, 489 U.S. at 665; *cf.* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 784 n.100 (1994) ("individualized suspicion makes sense as a prerequisite for warrants, but it does not make sense as the test for all searching and seizing--outside the criminal context, for example").

In *T.L.O.*, the Supreme Court first recognized the existence of "special needs" in the public school context. The Court noted that the special needs exception applies only "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *T.L.O.*, 469 U.S. 342 n.8; *see also Skinner*, 489 U.S. at 624 (stating exception applies where privacy interests are minimal and "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion"). In *T.L.O.*, the Court balanced the student's privacy interests and the school's need to maintain order and discipline in the school setting, and held that a warrant was not required for a search of a student by a school official. 469 U.S. at 340-41. The Court explained that "requiring a

teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* *T.L.O.* not only eliminated the warrant requirement, but also reduced the level of suspicion needed to justify a search. *Id.* at 341. Nevertheless, the search in *T.L.O.* was based on individualized suspicion. *Id.* at 342 n.8.

The Supreme Court subsequently applied the "special needs" exception in upholding the constitutionality of random drug testing of students who participated in athletics in *Veronia School District 47J v. Acton*, 515 U.S. 636 (1995).[12] The drug testing program in *Veronia* was motivated by a "sharp increase" in disciplinary problems due to drug use, *id.* at 648, with the athletes as leaders in the drug culture. *Id.* at 649. The student body was in a "state of rebellion," with disciplinary problems at "epidemic proportions." *Id.* The expressed purpose of the drug testing program was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650. Only a limited number of high-ranking school officials had access to the test results. *Id.* at 651. If a student tested positive, a second test was taken. If the second test was positive, the student's parents were notified and the student could be suspended from athletics. (A negative result led to no further action.) *Id.*

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[12] "Special needs" have been found in a number of other contexts, including regulation of the conduct of railroad employees for safety purposes, *Skinner*, 489 U.S. at 620, and in drug testing of Customs Service employees who would carry firearms or engage in drug interdiction. *Von Raab*, 489 U.S. at 668.

The Supreme Court held the drug testing program reasonable under the Fourth Amendment. The Court first explained that "whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.'" *Veronia*, 515 U.S. at 652-53 (citations omitted). The Court first considered the nature of the privacy interest at stake and said that public school children had a lesser expectation of privacy than the regular population. *Id.* at 654-55. The Court stated that *T.L.O.* had "emphasized that the nature of [the state's] power [over school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655; *see also Todd v. Rush County Schs.*, No. 97-2548, 1988 WL 7352, at *2 (7th Cir. Jan. 12, 1998) (citing *Veronia*). The Court also recognized that school authorities act "in loco parentis" for many purposes and that they regularly are required to submit to many types of physical examinations. *Id.* at 654-55. The Court noted that the students voluntarily participated in athletics. *Id.* at 657. The Court emphasized that student athletes had an even greater reduction in their expectation of privacy because they gave up more privacy in order to participate in athletics, *id.*, and that the risk of physical harm to drug users who are athletes was high. *Id.* at 662.

The *Veronia* Court next considered the character of the intrusion on the privacy interest caused by the drug testing, focusing on the manner of testing and the information disclosed by the testing. 515 U.S. at 658-60. The Court noted that the testing was performed under conditions "nearly identical to those typically encountered

in public restrooms," and, therefore, concluded that invasion of privacy by virtue of the testing process was "negligible." *Id.* at 658. The Court found "significant" that the tests screened only for drugs and not for other conditions such as diabetes, epilepsy, or pregnancy. *Id.* (citing *Skinner*, 489 U.S. at 617). The Court also noted that the tests were standard and did not vary according to the student's identity. Lastly, it was significant that the test results were disclosed only to a few school officials on a need-to-know basis and were not used for any internal discipline or given to law enforcement. *Id.*

The *Veronia* Court determined that the nature of the government concern -- deterring drug use by students -- was important, if not compelling. *Veronia*, 515 U.S. at 660-63; *see also Todd*, 1998 WL 7352, at *2. The Court found that the "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* at 661. It was noted that student drug use affected not only the users but also the entire student body, the faculty, and the educational process. *Id.* at 662. The *Veronia* Court explained:

> The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. . . . [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 665. The Court noted that there was no significant opposition to the drug testing program: although a public meeting was held to ascertain parents' opinions on the

program, no one other than the parents involved in the case before the Court had objected. *Id.*

The Seventh Circuit's recent decision in *Todd v. Rush County Schools*, No. 97-2548, 1998 WL 7352 (7th Cir. Jan. 12, 1998), took *Veronia* one step further. *Todd* upheld random, suspicionless drug, alcohol, and tobacco testing of all high school students who participate in any extracurricular activity. A positive test result was not used in school disciplinary proceedings, but the student could be barred from athletics. *Id.* at *1. The Seventh Circuit stated that its decision was governed by *Veronia* and *Schaill v. Tippecanoe County School Corporation*, 864 F.2d 1309 (7th Cir. 1988) (upholding random drug testing for student athletes). The policy at issue in *Todd*, as in *Veronia* and *Schaill*, "was undertaken in furtherance of the school districts' 'responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.'" *Todd*, 1998 WL 7352, at *2 (quoting [*Veronia*, 515 U.S. at 665,] 115 S. Ct. at 2396). In fact, the *Todd* court described the "linchpin" of the drug testing program as "protect[ing] the health of the students involved." *Id.* In *Todd*, as in *Veronia* and *Schaill*, students were required to submit to a drug test only as a condition of their voluntary participation in an extracurricular activity. *Id.*, at *3; *Schaill*, 864 F.2d at 1319. Further, as in *Veronia*, the drug testing "program was designed to deter drug use and not to catch and punish users." *Todd*, 1998 WL 7352, at *2. The Seventh Circuit has viewed participation in extracurricular activities as a benefit, with "enhanced prestige and status in the student community," and has explained that "it is not unreasonable to couple these benefits with an obligation to undergo drug testing." *Todd*, 1998 WL 7352,

at *3 (quoting *Schaill*, 864 F.2d at 1320). Therefore, the Seventh Circuit held that the drug testing at issue in *Todd* did not violate the Fourth Amendment. *Todd*, 1998 WL 7352, at *2-3.

The "special needs" exception is applicable in the instant case. The search at issue is not based on the normal need for law enforcement or crime detection. *See, e.g., Von Raab*, 489 U.S. at 666. No law enforcement officials are involved in the testing, and the results of the test are not used punitively. As the Supreme Court expressed in *T.L.O.*, "the substantial need of teachers and administrators for freedom to maintain order in the schools" is a special need such that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341.

Mr. Willis contends that the search at issue is not random and *Veronia* does not apply. He is correct that the search in this case is not random, but he points to no language in *Veronia* which limits its special needs analysis to random searches. Indeed, the court finds no such language in the *Veronia* majority opinion. The court recognizes, however, that applying *Veronia*'s principles to a nonrandom search is an extension of *Veronia*, but it is the logical extension.

The determination that this case presents "special needs" in and of itself is not sufficient. The court must consider the privacy interests at stake. *See Pierce v. Smith*, 117 F.3d 866, 874 (5th Cir. 1997) (holding defendants entitled to qualified immunity as a defense to medical resident's claim that requiring her to submit to urinalysis drug testing

violated her Fourth Amendment rights). As the *Veronia* Court found, public school children have reduced expectations of privacy in the school setting. Thus, Mr. Willis, as a public school student, has a reduced privacy interest, and the nature of his privacy rights is only that which is appropriate for public school children. Because Mr. Willis is not, at least according to the record before this court, a student athlete, who has an even lesser expectation of privacy, is of no consequence. Importantly, the Court first noted that all public school students had a lesser privacy interest, and then added that for student athletes the expectation was even lower. That Mr. Willis is a public school student is sufficient to lessen his privacy interests in the school setting.

Moreover, the intrusiveness of the search here is quite minimal. It is noted that Mr. Willis has not objected to the process by which the drug test is conducted, and the court presumes that the process is similar to that used in *Veronia*. There, *the* Court found the privacy interests invaded by such a process to be "negligible." *Veronia*, 515 U.S. at 658. There is no evidence that drug test is used to screen for anything other than drugs and alcohol, such as diabetes or epilepsy. *See id.* Additionally, it appears that the test is standard and does not vary depending on the identity of the student being tested. Only positive test results are disclosed, and the results are disclosed to a very limited group of people on a need-to-know basis. The test is not undertaken for law enforcement purposes or to catch and punish drug users, and law enforcement personnel are not involved in the testing in any manner. The court finds that the character of intrusion on Mr. Willis's privacy interests is similar to that upheld in *Veronia*.

That the drug testing policy is not limited to students who voluntarily choose to participate in athletics or other extracurricular activities as in *Veronia* and *Todd* is not decisive. The School Corporation argues that Mr. Willis "essentially chose to be subject to the drug test just as if he had participated in athletics or other activities under *Veronia* and *Todd*" by fighting "with full knowledge of the drug testing policy." (Suppl. Br. at 4-5.) Although Mr. Willis is correct that he did not, by virtue of fighting, waive his Fourth Amendment rights, (Pl.'s Suppl. Br. at 8), his misconduct in fighting is unavoidably one aspect of the totality of the circumstances under which the reasonableness of the search is determined. Mr. Willis is presumed to know the terms of the School Corporation's drug testing policy. By fighting, he voluntarily engaged in conduct which, under the policy, increased the likelihood that he would be subjected to a drug test. Like the students who chose to participate in athletics in *Veronia* and the students who chose to participate in extracurricular activities in *Todd* with the knowledge that their conduct (participation) could subject them to a drug test, Mr. Willis chose to engage in misconduct that could subject him to a drug test. *See Veronia*, 515 U.S. at 685-86 (O'Connor, J., dissenting) (noting that a drug program which tested students who violate rules would allow them to control through their behavior the likelihood of being tested) Thus, this case is more similar to *Veronia* and *Todd* than Mr. Willis suggests. Further, as with a search based on individualized suspicion, under the School Corporation's drug testing policy, students have "considerable control over if they will, in fact, be searched," *Veronia*, 515 U.S. at 667 (O'Connor, J., dissenting), because they can avoid the search by not engaging in the types of misconduct that increases the likelihood of their being subjected to a drug test under the policy.

That students can control the likelihood of their being searched under the School Corporation's drug testing policy is a significant factor that weighs in favor of finding the search reasonable under the circumstances. Justice Ginsburg's concurring opinion in *Veronia* provides further support in this regard. She explained that *Veronia* reserved "the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." *Veronia*, 515 U.S. at 666 (Ginsberg, J., concurring). She then referred to *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974), an airport search case, stressing that travelers could avoid a suspicionless search of their persons and luggage "by choosing not to travel by air." *Id.* As one scholar has observed:

> It is significant that this theme runs through most of the nonsuspicion search cases: the airline traveler, the border crosser, the businessman who elects to undertake a closely regulated business, the employee who elects to take a job necessity his close scrutiny, all can in a sense be said to have opted for this highly unusual suspicionless search regime. (The notion is not that by electing to engage in that activity the person has impliedly consented to the search, but only that this opportunity to avoid such intense scrutiny is of some relevance in making a judgment about the reasonableness of a suspicionless search scheme.) It is also significant that this very point was given considerable emphasis by the *Acton* majority; they stressed that student athletes have "even less" privacy than students generally because in choosing to participate in athletics "they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (West Publishing Co., 3d ed. 1996 & 1998 Supp.) § 10.11. Mr. Willis did not impliedly consent to the search by engaging in misconduct of fighting; however, the fact that he

could have avoided the drug test by refraining from such misconduct is relevant to the determination of reasonableness of the search at issue and, weighs in favor of a determination that the search is reasonable.

Finally, the nature of the School Corporation's interest must be balanced with Mr. Willis's privacy interests. The School Corporation's interest in deterring drug use by and protecting the health of its students is indeed important, if not compelling. *See Veronia*, 515 U.S. at 661; *Todd*, 1998 WL 7352, at *2-3. Similar to *Veronia*, the drug testing policy was undertaken in furtherance of the public school system's responsibilities as guardian and tutor, which the Supreme Court deemed "most significant." *Veronia*, 515 U.S. at 665. Given the recognition of an increasing drug and alcohol abuse problem among the high school students within the School Corporation, reflected in the number and types of disciplinary problems, the court concludes that a reasonable guardian and tutor might require Mr. Willis to submit to a drug test under the circumstances presented.[13] The court recognizes that the record does not necessarily show that the problem in the Anderson schools rises to the epidemic levels existing in *Veronia*. However, in *Todd v. Rush County Schools*, No. IP96-1417-C-T/G, 1997 WL 710661

[13] It is significant that the testing is done here *after* the suspension rather than immediately following the fight. It cannot be confused with evidence gathering to support the suspension for fighting. This timing reflects legitimate concern by school authorities about how the suspended student utilizes the idle time of the suspension as well as concern about collateral conduct which may underlie the disruptive behavior that resulted in the suspension. These are appropriate concerns for the school officials before returning the suspended student to the environment in which the disruption occurred. This point in time may also be ideal for parental and counseling intervention in response to rebellious behavior in the form of substance abuse, manifested by disruptive conduct.

(S.D. Ind. June 2, 1997), *aff'd*, No. 97-2548, 1998 WL 7352 (7th Cir. Jan. 12, 1998), this court explained:

> There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the 'important enough' interest on the part of the school system discussed in *Veronia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

Id. at *7. That reasoning applies equally here. Moreover, the record shows that no parent or guardian of a student attending school within the School Corporation, other than Mr. Willis's father, has disagreed. On the basis of the record before it, the court is hesitant to dispute the determination of the parents, guardians, and the School Corporation that the drug testing policy is reasonably within the student's interests under the circumstances. *See Veronia*, 515 U.S. at 665.

The School Corporation further contends that its drug testing policy is a permissible disciplinary action. (Defs.' Suppl. Br. In Opp'n to Entry of Prelim. Inj. at 3.) In *Skinner*, the Court upheld a regulation which, *inter alia*, gave railroad officials the discretion to test employees for alcohol and drugs, without individualized suspicion of drug use, provided they had violated certain safety rules, including noncompliance with a signal and excessive speeding. *Skinner*, 489 U.S. at 611, 634. Following *Skinner*, a drug testing policy which required a student guilty of misconduct in violation of a school rule to submit to a drug test would be reasonable. There is even less discretion under the School Corporation's policy than under the regulation challenged in *Skinner* where the decision to test an employee for violating a rule was a discretionary one. Here, the

test is mandatory if the student meets the criteria under the policy, and as Dean Nikirk has testified, the students are required to submit to the tests without exception.

Under all the circumstances of this case, where law enforcement and crime detection are not the design or end result of the drug testing policy; the need to deter drug use by school students in Anderson, Indiana is a very important, if not compelling, governmental interest; and where the intrusiveness of the drug test and Mr. Willis's privacy interests are minimal, requiring Mr. Willis to submit to a drug test upon his return to school appears to be reasonable. The School Corporation has advanced a legitimate reason for requesting Mr. Willis to submit to the drug test. As the Seventh Circuit reiterated approximately two weeks ago:

> the plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose -- the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.

Todd v. Rush County Schs., No. 97-2548, 1998 WL 7352, at *3 (7th Cir. Jan. 12, 1998) (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988)).

When Mr. Willis's privacy interests are balanced against the important governmental interest at stake, the search at issue appears to be reasonable under all the circumstances. The court holds, therefore, that Mr. Willis has not shown a likelihood of prevailing on his claim that the School Corporation's drug testing policy as applied to

him under the circumstances constitutes an unreasonable search of his person in violation of the Fourth Amendment or in violation of the Indiana Constitution. Similarly, he has not shown that the policy violates Indiana Code § 20-8.1-5.1-8. Accordingly, the Verified Motion for Preliminary Injunction is **DENIED**.

III. Conclusion

Mr. Willis has not shown a likelihood of success on the merits of his claim that the search conducted under the School Corporation's drug testing policy is

unreasonable under all the circumstances or in violation of Indiana law. Therefore, his Verified Motion for Preliminary Injunction is **DENIED**.

ALL OF WHICH IS ORDERED this 28th day of January 1998.

John Daniel Tinder, Judge
United States District Court

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